1983

State of Utah v. Claude A. Bundy : Appellant's Brief

IN THE SUPREME COURT OF THE

STATE OF UTAH

TATE OF UTAH, :

Plaintiff-Respondent, :

: Case No. 19013

LAUDE A. BUNDY, :

Defendant-Appellant. :

APPELLANT'S BRIEF

Appeal from Final Judgment and Sentence of the Third Judicial District Court in and for Salt Lake County, Utah, Honorable Dean E. Conder, Judge

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APPELLANT'S BRIEF

NATURE OF CASE

Defendant-Appellant, Claude Albert Bundy, was charged with two first degree felony crimes, to wit: rape, in violation of §76-5-402, Utah Code Annotated, 1953, as amended, and forcible sodomy, in violation of §76-5-403, Utah Code Annotated, 1953 as amended.

DISPOSITION OF LOWER COURT

The Lower Court, the Honorable Dean E. Conder, Judge, granted judgment and imposed a sentence on the verdict of the jury impaneled to try and hear the case.

RELIEF SOUGHT ON APPEAL

The Defendant-Appellant requests this Court to reverse the judgment of the Lower Court and remand the case to the District Court for a new trial and other further proceedings.

STATEMENT OF FACTS

The Defendant was arrested and charged with two first degree felony crimes, consisting of rape and forcible sodomy. These acts were alleged to have occurred between the Defendant and a Sherry Christiansen, a female under the age of 14 years, not his wife.

The alleged victim was Sherry Christiansen. Sherry was the younger sister of the Defendant's wife. The evidence was that this Sherry had been a babysitter for the Defendant and his wife for a period from April, 1981 through December, 1981. This entailed her having to spend many nights at the Defendant and his wife's home in connection with the babysitting. The Defendant was working either regular work shifts or afternoon shifts, and the Defendant's wife was working graveyard shifts. The acts were alleged to have occurred on a number of nights during the period at the home of the Defendant, and some acts allegedly at the home of the victim.

In addition to the victim, the State called five (5) other witnesses. These were a Douglas Christiansen, the father of the victim and father-in-law of the Defendant; Lori C. Bundy, the Defendant's wife; a Dr. Lillian Teigland, a physician who examined the victim; Jesus Castaneda, a West Valley City Policeman who made an initial report; and Welby Scott, a West Valley City Detective who did follow up work in this case.

The only witness for the defense was the Defendant, Claude Bundy, who denied the actions having occurred.

Upon the calling of the Defendant's wife, counsel for the parties went into chambers with the Judge to discuss appropriateness of the testimony of the wife, and objection made thereto. (Tran. of Trial page 23 and 74-82). The off the record discussion concerned the nature of the testimonial privilege with regard to marital communications. As a result of the statement by the prosecutor that no communications would be gone into, and the limited nature of the proposed testimony, counsel for the Defendant did not object on the record to the calling and examining of the Defendant's wife. However, the Defendant was not present during said discussion, did not consent to said testimony, and later voiced strong and appropriate objection thereto. (See discussion at Tran. of Trial pages 74-82).

At the close of the State's case, the Defendant again renewed his motion for mistrial setting forth the appropriate statute with regard to competency of witnesses. (See Tran. of Trial, pages 159-163). The Court again took the motion under advisement and the Defendant was called to the stand.

The jury returned with verdicts of guilty on both counts, and the Defendant was sentenced to two concurrent terms in the Utah State Prison of five years to life. The Court than denied the Defendant's motion for mistrial.

ARGUMENT

POINT I: THAT THE TRIAL COURT IMPROPERLY AND PREJUDICIALLY ALLOWED THE CALLING TO THE STAND AND THE TESTIFYING OF THE DEFENDANT'S

WIFE.

There has long been recognized, both at common law and be statutory law, a spousal privilege which prohibits or circumscribes the testimony of one spouse against another. It is generally recognized that there are three separate types of privilege which might be in force and effect. In the Court below counsel for the State and the Court apparently concerned themselves with two of the privileges, but ignored the third, as raised by counsel for the Defendant below.

The first type of privilege is normally known as the "compelled" privilege. This provides that a spouse can not be compelled to give evidence against their spouse. Such is explicitly stated in the Utah Constitution, Article I, §12. Such was not really an issue in the case below, as the Defendant's spouse, Lori C. Bundy, was willing to testify against her husband.

The second type of marital privilege is normally referred to as the marital communication privilege. It is set forth in Rule 28 of the Utah Rules of Evidence. In essence, it provides that confidential communications between spouses are privileged, and can not be testified to absent consent of both parties. Further, such privilege exists beyond the termination of the marriage.

The third type of privilege has to do with the competency of a spouse to testify against the other in the absence any consent. It is set forth in §78-24-8, 1953 UCA, which st

as pertinent part:

> There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate. Therefore, a person cannot be examined as a witness in the following cases:
>
> (1) A husband cannot be examined for or against his wife without her consent, nor a wife for or against her husband without his consent; nor can either during the marriage or afterwards be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other, nor for the crime of deserting or neglecting to support a spouse of child, nor where it is otherwise specially provided by law.

In the case at bar, the testimony of Mrs. Bundy was clearly in derogation of the Defendant's substantial rights not to have her testify without his consent, as she did testify. Further, the prohibition contained in the above statute is expressed in terms of competency to testify. Thus, she was incompetent to testify at all in the absence of his expressed consent.

The discussions of the attorneys' for the parties and the Court indicate that there was no consent by the Defendant and that much of the concern, mostly expressed off the record, had to do with the first two types of spousal privilege, and not the third which was raised by the defense counsel. (See discussion of parties at Tran. of Trial, pages 74-82, and pages 159-163). At no time was the consent of the Defendant obtained, and in fact, an expressed disavowal and disapproval was noted.

The prejudicial nature of the testimony should also be clear from the transcript of the trial. The Defendant was charged with rape and forcible sodomy on his wife's little sister. He denied that those actions occurred. Therefore the credibility and believability of the victim and Defendant were crucial, and the showing of loyalties to those two individuals would help a jury in its choice of whom to believe. Thus, the fact of the Defendant's wife freely testifying for the State against her husband could easily be seen by the jury to be disparaging and prejudicial to the Defendant. Further, much of her testimony was of a prejudicial nature and manner designed to put the Defendant in a bad light with the jury. These included such items as the young age of the Defendant at their marriage and her sympathy toward the victim. In a close case, with two witnesses giving opposing views of what transpired, such subtle and indefinite factors often tip the balance in a jury's mind.

This Court has also recognized the subtle nature of a violation of this privilege and the prejudice to a Defendant. In State v. Brown, 383 P.2d 930, 14 Utah 2d 324 (1963), the defendant had been found guilty of raping a sixteen year old girl. His defense was alibi in that he had been at home with his wife at the time the alleged acts occurred. The defendant testified but his wife did not testify. The district attorney, in arguing to the jury stated that the one person besides the defendant who could have testified that he was at home was the defendant's wife and she did not testify. This court held that such comment on privilege was prejudicial error and remanded the case back down

... a new trial based merely upon that one comment on the pri... In the case at bar, the Defendant's wife did testify, ... attorney for the State argued from some of the testimony ... evidence that she gave. (See Tran. of Trial, page 193).

POINT II: THAT OPINION TESTIMONY WAS IMPROPERLY ADMITTED INTO EVIDENCE WHICH PREJUDICED THE DEFENDANT AND WAS PLAIN ERROR.

During the course of the trial, evidence was admitted that indicated that a charge a child molestation of the victim had been made with the perpetrator being the victim's father and the Defendant's father-in-law. During the course of the trial, officer Welby Scott, a detective for West Valley City Police, testified that he did follow up work on that accusation. He also was allowed to testify that the accusations, in his opinion, were unfounded and there was no substance to the charge. (See Tran. of Trial, page 151). Such an opinion testimony is improper, prejudicial to the Defendant, and in the case at bar constitutes plain error which this Court can review.

Testimony in the form of an opinion is governed by Rule 56 of the Utah Rules of Evidence. Such Rule states:

> (1) If the witness is not testifying as an expert his testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clear understanding of his testimony or to the determination of the fact in issue.
> (2) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are

(a) based upon facts or data perceived by or personally known or made to known to the witness at the hearing and (b) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(3) Unless the judge excludes the testimony he shall be deemed to have made the finding requisite to its admission.

(4) Testimony in the form of opinions or inferences otherwise admissible under these rules is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of the fact.

Officer Scott, it is submitted, would in this instance be testifying not as an expert. The testimony concerns itself with a resolution of factual issues and statements, Detective Scott is not qualified as an expert to resolve factual disputes. His testimony should have been limited to what actions, if any, he took in investigating the charges.

Even as an experienced and "expert" police officer, Detective Scott would not be competent to give his opinion as he did here. He would not be testifying based upon his specialized knowledge and training, and there is insufficient facts and data perceived by him to make such an opinion. Just as an officer would be prohibited from stating his opinion that, based upon his experiences as a police officer, a defendant is guilty beyond a reasonable doubt or that the evidence presented at trial indicates that the defendant is guilty beyond a reasonable doubt so this officer should not have been allowed to testify that there was no basis to the allegation involving the victim's father.

The above testimony was not objected to by counsel for Defendant. However, it is submitted that such an opinion would be improper in a criminal case, and constitutes "plain error" such that this Court can review the matter.

In a case such as this, here this is an allegation of rape and forcible sodomy on a thirteen year old girl, and the Defendant denies that the actions occurred, it is a close case for a jury to decide. Further, subtle matters and factors and effects may sway and influence the jury differently than in cases involving other crimes and other evidence. Therefore this Court should review more closely the evidence admitted at the trial to assure that improper subtle influences and factors are not laid before the jury such that they may base their decision on improper matters. In the case at bar, in addition to the Defendant's denial, there was evidence of both a family cover up and of a family conspiracy against this Defendant with regard to this Defendant's actions in pending civil divorce litigation. That family conspiracy and cover up would include the Defendant's wife, her sister the victim, and the victim's father. Therefore this improper opinion by the Detective might have been highly prejudicial and influential on the jury with regard to resolving the disputes between the Defendant and that family. As such, this Court should strictly review that testimony to insure that improper factors did not influence the jury.

CONCLUSION

It is requested that this Court reverse the conviction

and sentence of the Defendant and remand the matter back to the Lower Court for a new trial. The case was a highly emotionally charged case involving heinous crimes and allegations, and this Court should strictly review the record herein. Improper evidence, testimony, and procedures would have a potentially greater impact on a jury than in most other cases. Therefore, the prejudice to the Defendant and his fundamental right not to have his wife testify against him, should mandate a reversal and remand. Further, the plain error of the opinion testimony of the Detective, and other evidentury imperfections in the record, in such a close case, should cause this Court to remand for a new trial. Although it is recognized that no trials are ever perfect, and that errors exist in all trials, in such a highly charged and close case as this one, this Court should remand for a new trial to insure that a jury does not base its decision on improper factors.

RESPECTFULLY SUBMITTED this _____ day of August, 1983.

ROBERTS & ROBERTS

By _____
THOM D. ROBERTS
Attorney for Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that two (2) true and correct copies of the foregoing Brief were mailed to the Attorney General's Office, State Capitol Building, Salt Lake City, Utah 84114, on this __ day of August, 1983.

_____

Signature